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ON CERTAIN CASES ANALOGOUS TO  
TRADE-MARKS.

THE law of a class of cases analogous to trade-marks is still in the process of evolution, and it may be useful to consider the principles which should govern the decision of cases of this sort.

The symbolism of commerce, conventionally called "trade-mark," is, according to Mr. Browne, in his excellent work on trade-marks, as old as commerce itself. The Egyptians, the Chinese, the Babylonians, the Greeks, the Romans, all used various marks or signs to distinguish their goods and handiwork. The right to protection in such marks has come to be recognized throughout the civilized world. It is, however, during the last seventy or eighty years that the present system of jurisprudence has been built up. In 1742 Lord Hardwicke refused an injunction<sup>1</sup> to restrain the use of the Great Mogul stamp on cards. In 1783 Lord Mansfield<sup>2</sup> laid the foundation of the law of trade-marks as at present developed, and in 1816, in the case of *Day v. Day*, the defendant was enjoined from infringing the plaintiff's blacking label. From that time to the present day there have arisen a multitude of cases, and the theory of the law of trade-marks proper may be considered as pretty clearly expounded. In 1875 the Trade-marks Registration Act provided for the registration of trade-marks, and defined what could in future properly be a trade-mark. In this country the Act of 1870, corrected by the Act of 1881, provided for the registration of trade-marks.

The underlying principle of the law of trade-marks is that of preventing one man from acquiring the reputation of another by fraudulent means, and of preventing fraud upon the public; in other words, the application of the broad principles of equity.

"I think that the principle on which both the courts of law and of equity proceed, in granting relief and protection in cases of this sort," says Lord Langdale in *Perry v. Truefitt*, "is very well understood. A man is not to sell his own goods under the pretence that they are the goods of another man. He cannot be permitted

<sup>1</sup> *Blanchard v. Hill*, 2 Atk. 484.

<sup>2</sup> *Singleton v. Bolton*, 3 Doug. 293.

to practise such a deception, nor use the means which contribute to that end;"<sup>1</sup> and again in *Croft v. Day*, "You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufactures of such other person, while he is really selling his own. It is perfectly manifest that to do these things is a fraud, and a very gross fraud."<sup>2</sup> This broad equitable principle is, however, limited in its application by the nature of a trade-mark. A trade-mark has become an absolute right. It is a mark affixed to goods which pass from hand to hand, and is an exclusive right to that sign in connection with goods of a certain kind, — a right as against all the world. It is a right capable of registration, and its registration must be noticed under penalty of the law. It is a right for the infringement of which redress will be given, although the intention of the infringer is not fraudulent.<sup>3</sup> A right so absolute could not be given without some qualifications, and we find that certain generic and geographical names are not such as may be exclusively appropriated by an individual; that words or signs which are not sufficiently distinctive, or are by their nature the property of the whole world, may not thus be appropriated. Indeed, the courts have laid down certain technical rules which must be observed to obtain a valid trade-mark.

In deciding whether there has been a breach of a trade-mark proper the courts are bound by these rules, and will grant no relief, whether they find fraud or not, unless there has been in use a trade-mark valid according to these rules, and unless there has been a technical breach. The only question is, whether the plaintiff has acquired an absolute right, and whether there has been an infringement of that right. What the rules of trade-marks are what is a valid trade-mark, what is an infringement, are not within the scope of this article. What it is important to recognize is this: That the foundation of the law of trade-marks is natural

<sup>1</sup> 6 Beav. 66.

<sup>2</sup> 7 Beav. 84.

<sup>3</sup> *Millington v. Fox*, 3 My. & Cr. 338; *Edelsten v. Edelsten*, 1 DeG., J. & S. 183; *Cartier v. Carlile*, 31 Beav. 292; *McLean v. Fleming*, 96 U. S. 245; *Upmann v. Forester*, 24 Ch. D. 231.

justice, or, as it is called, the principles of equity; that a trade-mark proper, being an exclusive right in an individual, the acquisition of this right had to be limited by certain rules; that this right, once acquired, becomes absolute, and that to constitute a breach of this right there must be a technical breach, independently of the question of the equity of the case, or rather independently of fraud, for there is no equity unless the technical trade-mark has been infringed.

Side by side with trade-marks has grown up another class of cases known as "cases analogous to trade-marks," — trade-names, trade-signs, the good-will of a business, etc., — as distinctive in their way as trade-marks, and as ancient. The Egyptians, the Greeks, the Romans, used striking sign-boards to distinguish their various trades. Addison devotes one number of the "*Spectator*"<sup>1</sup> to the various trade-symbols and trade-signs of the city of London. Tavern signs, such as the "White Horse," the "Blue Boar," the "Hand and the Bell," have long been in use. Cases analogous to trade-marks, however, differ from trade-marks in that they are not a mark stamped on goods which pass from hand to hand, and therefore are not technically trade-marks and do not fall within the rules of trade-marks. They differ from trade-marks in form, not in kind. Each owes its existence to the desire of the individual to stand out from the surrounding masses, and fairly, in the face of men, to get the full advantage to which his ability and industry entitle him.

In the class of cases known as "analogous to trade-marks," the right of a plaintiff is very different from what it is in cases of trade-marks proper. Here there is no question of a technical, well-defined right, an exclusive right; there is no certain mark or sign to which an individual is establishing a permanent claim; by the nature of the claim there is no possibility of registration. What each plaintiff asks is this: that he shall be protected against the fraud of a particular defendant. Fraud being an essential element in this view, the court must find a fraudulent intention from the peculiar circumstances of each case. As there is no question of granting an exclusive right, the court may apply to the facts of each case, without regard to the limitations by which it is bound in cases of technical trade-marks, the equitable principles which underlie the law of trade-marks. And the court may give

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<sup>1</sup> No. 28, April 2, 1711.

the larger scope to its relief from the fact that each decision does not lay down a fixed rule applicable to all cases of this class, but only relieves against whatever fraud is working damage under the facts of each case.

The distinction between the law of trade-marks and of cases analogous to trade-marks, I understand to be this: In cases of trade-mark there is a definite exclusive right, which may be acquired according to definite rules, and which may be infringed in certain definite ways. The right is recognized as being exclusively the plaintiff's, and, indeed, it is by virtue of his exclusive right that he gets relief. Unless he has a trade-mark within these technical rules he has no exclusive right and can get no relief, and the court will be bound by technical rules in determining whether he has a trade-mark or not. In cases analogous to trade-marks, the right of the plaintiff is only against a particular defendant by reason of his fraud, and the court will apply the equitable principle of the prevention of fraud to the circumstances of each case.

The courts have recognized this distinction clearly. The reasoning of the English courts in the late cases on the subject leave no doubt of it.

In *Lee v. Haley*, L. R. 5 Ch. App. 155, the facts were as follows: The plaintiffs had carried on for some years at No. 22 Pall Mall, under the style of "The Guinea Coal Co.," a large business which had a considerable reputation. The defendant, who had been their manager, set up a rival business on the Strand under the name of "The Pall Mall Guinea Coal Co.," and soon removed to No. 46 Pall Mall. Many persons were misled into giving orders to the defendant, in the belief that his concern was that of the plaintiffs. The defendant set up in defence to a bill for an injunction by the plaintiffs that the plaintiffs habitually sold short weight, and that they had no exclusive right to the name "Guinea Coal Co.," which was used by various other establishments about London. The court held that if the plaintiffs had been systematically carrying on a fraudulent trade, and delivering short weight, it is beyond all question that it would not interfere to protect them in carrying on such trade. The court also held that, although the plaintiffs had no exclusive right to the name, an injunction to restrain the defendant from using the name "The Pall Mall Guinea Co.," in *Pall Mall*, was proper, on the ground

that the defendant had no right to use the name in such a way as to lead persons to believe that his business was that of the plaintiffs, and that therefore there was no objection to confining the injunction to the use of the name in a particular place, inasmuch as its tendency to deceive greatly depended on the place where it was used. In the words of Lord Justice Giffard, "I quite agree that they [the plaintiffs] have no property in the name, but the principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade, and carried it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name." I wish to call attention to what this decision means. It means the strict application of equitable principles to these facts. The defendant is enjoined only from using the name "Guinea Coal Co.," in Pall Mall, in the street where it is likely to cause confusion, the relief the court thought necessary under these circumstances to prevent fraud. And this relief was made dependent, as, indeed, it is in every case of trade-mark,<sup>1</sup> on the plaintiffs coming into court with clean hands, — a principle familiar to all proceedings in equity.

In *Wotherspoon v. Currie*, L. R. 5 H. L. 508, the facts are these: the plaintiffs had for some years manufactured starch at Glenfield, and their starch had become known as "Glenfield Starch." Their business increasing, they removed from Glenfield, although they continued to call their starch by the same name. The defendant established himself at Glenfield, and began to manufacture starch under the name of "Glenfield Starch." It was argued for the defendant that there could be nothing wrong in his using the name of the place where the starch was actually made, and that there was no misrepresentation or fraud; but the court thought otherwise, and an injunction issued to restrain the defendant from using the word "Glenfield" in or upon any labels affixed to packets of starch manufactured by him, and from in any other way representing the starch manufactured by him to be "Glenfield" starch, and from selling or causing the same to be

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<sup>1</sup> *Hobbs v. François*, 19 How. Pr. 567; *Fetridge v. Wells*, 13 How. Pr. 385; *Partidge v. Menck*, 1 How. App. Cas. 558.

sold as "Glenfield" starch, and from doing any act or thing to induce the belief that starch manufactured by him is "Glenfield" starch, or starch manufactured by the plaintiffs. Here is granted equitable relief of a kind impossible under the technical law of trade-marks.

The late case of *Thompson v. Montgomery*, 41 Ch. D. 35, is an important one as expressing clearly the difference of right in trade-marks and in cases analogous to them. There the plaintiffs had for years carried on a brewery at Stone, and their ale had come to be known as "Stone Ale." They had registered these words as a trade-mark. The defendant built a brewery at Stone, and attempted to call his ale "Stone Ale." The court held that the words "Stone Ale" were not such as might be used as a trade-mark, and ordered them to be struck out of the register. But as to the right, apart from the technical trade-mark, Lord Justice Lindley says: "The plaintiffs' rights are to prevent anybody from passing off his goods as the goods of the plaintiffs. Sir Horace Davey says that the plaintiffs have no exclusive right to the use of the words 'Stone Ale' alone. Perhaps not as against the world. He says that the plaintiffs have not any right to prevent the defendant selling his goods as having been made at Stone; I am not prepared to say that they have. But as against a particular defendant, who is fraudulently using, or going to fraudulently use, the words with the express purpose of passing off his goods as the goods of the plaintiffs, it appears to me that the plaintiffs may have rights which they may not have against other traders." And an injunction issued.

In no one of these cases is there a breach of what might be a technical trade-mark. "Guinea Coal Co.," "Glenfield Starch," "Stone Ale," according to the law of trade-marks proper, were unfit names to be used as trade-marks. Yet the court in each case went far beyond the analogy of trade-marks, and, applying the underlying equitable principle as laid down by Lord Langdale in *Perry v. Truefitt*, that it is a fraud for a man to sell his goods under the pretence that they are the goods of another man, gave such relief against that particular fraud as the circumstances of the case demanded. The principle on which the courts went is unmistakable. They admit no exclusive right in the plaintiffs, but "it is a fraud on a person who had established a trade, and carried it on under a given name, that some other person should

assume the same name . . . in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name." The key-note is fraud; fraud on the public and fraud on the individual injured in his business.

In this country the great distinctive principle has not been enunciated with as great clearness as in England, but I think the decisions show a recognition of it.

In *Colton v. Thomas*, 2 Brews. 308, the plaintiff practised as a dentist under the name of the Colton Dental Association. The defendant, who had been in his employ, left him and put up a sign reading, "Dr. F. R. Thomas, late operator at the Colton Dental Rooms," the words "late operator at the" being in very small letters. Injunction granted to restrain the defendant from using such signs and cards, and from representing his place of business to be the plaintiff's. The case of *Saunders v. Jacobs*, 20 Mo. App. 96, is similar; the name "Newark Dental Rooms" was enjoined as being too much like "New York Dental Rooms." The "What Cheer House" was held to be a name which a rival hotel-keeper could not use (*Woodward v. Lazar*, 21 Cal. 448). In *Howard v. Henriques*, 3 Sandf. 725, the proprietor of the "Irving House" was allowed to restrain the defendant from opening a hotel under the same name. The court, by Mr. Justice Campbell, said: "We are not disposed to interfere with the lawful pursuits of any one. Every man may and ought to be permitted to pursue a lawful calling in his own way, provided he does not encroach upon the rights of his neighbor or upon the public good. But he must not by any deceitful or other practice impose upon the public; and he must not, by dressing himself in another man's garments, and by assuming another man's name, endeavor to deprive that man of his own individuality, and thus despoil him of the gains to which by his industry and skill he is fairly entitled." Mr. Browne, in commenting on this case, § 96, says that the name of a hotel cannot be twisted into a trade-mark. "Then, if not a case of trade-mark, what was it? It was exactly what the Superior Court called it: the 'good-will' of the establishment. The case did not call for a definition. All that was required was substantial justice, upon the allegation of the invasion of an equitable right." In *Walker v. Alley*, a Canadian case reported in 13 Grant Up. Can. Ch. 366, the plaintiff had established a dry-



goods house under the sign and name of the "Golden Lion." The defendant attempted to begin a similar business under the same name and sign. An injunction issued. *Per curiam*: "You have your choice of many signs which, as a mere attraction, or to give your store a marked designation, must answer a fair business purpose equally well."

A late case in the Circuit Court of Pennsylvania<sup>1</sup> seems to recognize the English doctrine that the fraud and not the analogy of a technical trade-mark is the important point. A bill alleged that the plaintiff alone possessed the right to bronze horseshoe nails as a trade-mark, and to sell the same under the trade-name; that the defendants sold bronze nails similar in appearance to those manufactured by the plaintiff; and that purchasers have been and are deceived into buying the articles so bronzed and sold by the defendants in the belief that they are of the manufacture of the plaintiff. The defendants demurred. Mr. Justice Bradley overruled the demurrer and gave the defendants time to answer. "Whether this is in itself a good trade-mark or not, it is a style of goods adopted by the complainants which the defendants have imitated for the purpose of deceiving, and have deceived, the public thereby, and induced them to buy their goods as the goods of the complainants. This is fraud. . . . The allegation that the complainants' peculiar style of goods is a trade-mark may be regarded as a matter of inducement to the charge of fraud. The latter is the substantial charge which we think the defendants should be required to answer."

The French courts have gone very far towards preserving commercial rights and applying equitable principles to commercial competition. There all "*concurrence déloyale*," all manœuvres that cause prejudice to the name of a property, to the renown of a merchandise, or in lessening the custom due to rivals in business, is restrained and punished.<sup>2</sup> Mr. Browne translates "*concurrence déloyale*" by "unfair competition in business" (§ 43). Mr. Browne, in his chapter on Rights Analogous to Trade-marks, has collected a number of the French cases, and I shall cite some of them to illustrate how far the courts have gone in applying the principles which, it seems to me, ought to govern cases of this class.

The plaintiffs were proprietors of a hat-shop founded twenty-

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<sup>1</sup> Putnam Nail Co. v. Bennett *et al.*, 43 Fed. Rep. 800.

<sup>2</sup> Say *c. Düringer*, 18 Annales, 148.

five years before as "*Maison Pinaud*," and established at 87 Rue Richelieu, Paris. The defendant, whose name was differently spelled but was pronounced the same, removed to 91 Rue Richelieu and established another hat-shop, under the name of "*Maison Pineau*." The court held that the defendant acted with the intention of profiting by the similarity of names, and to divert to himself the custom of the old house of Pinaud; that although he had an incontestable right to establish himself under his true name, yet he must be interdicted from unlawful competition, and measures must be taken to prevent confusion in the mind of the public between the two houses. *Pinaud & Amour c. Pineau*, 4 *Annales*, 86; the case of *Bonnet et al. c. Henri Delisle*, 4 *Annales*, 301, illustrates the same principle. In the case of *Dorvault c. Hureaux*, 4 *Annales*, 125, the plaintiffs had for about twenty-five years used as a sign and upon their labels and circulars the words "Pharmacie Centrale de France." The defendants had as their sign the words "Pharmacie Rationelle," but added "Centrale de France." This fact was recognized by the court as an attempt to create confusion between the two establishments, and the defendants were prohibited from the further use of the latter-mentioned words. In *Muller c. Compagnie Immobilière*,<sup>1</sup> the plaintiff had for more than fifteen years carried on the "Hôtel de la Paix." The defendants built a hotel on the same street and gave it the same name. The court held that the words "Hôtel de la Paix" were indicative and characteristic of the hotel owned by Muller, and that those words could not be used by others in the same business without violating his rights.

The cases of the "*Banque du Commerce et de l'Industrie c. Banque Centrale du Commerce et de l'Industrie*,"<sup>2</sup> of "*Banque Populaire c. Banque Populaire d'Escompte*,"<sup>3</sup> of the signs "*Entrepôt d'Ivry*" and "*Chautier du Grand Ivry*,"<sup>4</sup> of "*Chauchard & Compagnie c. Dreux-Bussienne*,"<sup>5</sup> of "*Samie c. Compagnie des Eaux Thermales de Royat*,"<sup>6</sup> of "*Moët c. Moët et Chandon*,"<sup>7</sup> show how careful the French courts are to prevent confusion in the minds of the public, insisting that each trader should stand

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<sup>1</sup> 8 *Annales*, 265.

<sup>2</sup> 29 *Annales*, 231.

<sup>3</sup> *Ibid.* 234.

<sup>4</sup> *Bulletin Officiel*, 222.

<sup>5</sup> *Dulloz Jurisprudence Générale*, 1884. *Cours d'Appel*, p. 84.

<sup>6</sup> *Dulloz Jurisprudence Générale*, 1884. *Cours d'Appel*, p. 226.

<sup>7</sup> *Ibid.* 1887. *Cours d'Appel*, p. 220.

on his own merits. In *V<sup>e</sup> Edrard c. Nicolas Edrard, Dulloz*, 1879, *Cours d'Appel*, p. 100, both the plaintiff and the defendant were manufacturers of pianos. The defendant placed his own name on his pianos, so that they were mistaken for those of the plaintiff. The court held that every man has a right to use his own name in his business, although he must not use it so as to usurp, by a fraudulent confusion, the advantages of the credit and reputation of another already established under that name, and the courts have the right to prescribe the measures necessary to avoid the fraudulent confusion which would result in such use. Here the court prescribed on what parts of the pianos the names (Christian as well as surname) of the defendant should appear, the size of the letters, and ordered that the name of his residence, "Mulhouse," should be used in connection with his own name, so as to distinguish him from the plaintiff.

In *Chaize c. Fromentelle*<sup>1</sup> the parties were tobacconists in the same neighborhood. The plaintiff's sign read, "La Civette." The defendant's read, "A la Nouvelle Civette." Both in this case and in a similar one where the sign was "A la Civette de la Rue de Rivoli," the plaintiff had judgment for the removal of the objectionable sign. In *Lebat v. Partongue, 1 Blanc, 709*, the Imperial Court of Paris held that the color of a sign and its general aspect are considered as sufficiently distinctive to be respected.

These French cases are indexed under the titles of "Concurrence Déloyale" and "Propriété Industrielle," a fact interesting as indicative of the principles on which the courts go. After having looked over a large number of cases in the original reports, a fair statement of these principles seems to me to be this: That a man shall not be restrained from using any words or signs to which he has a right, unless he uses such words or signs in unfair competition with one who has a prior right to the same or similar words or signs; that all competition which the court sees to be unfair and likely to cause confusion in the mind of the public and injury to the lawfully established trade of the plaintiff shall be restrained, and that the court will order such changes in the objectionable features of the competition as will put an end to the fraud.

The present article was suggested by two cases which have come up lately in this State before single justices on bills for an injunc-

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<sup>1</sup> 11 *Annales*, 350.

tion. In the first case, the American Waltham Watch Company asked for an injunction against the use of the words "Waltham Watch" by the United States Watch Company. Both corporations are established at Waltham, — the defendant recently, the plaintiff for many years. The watches of the plaintiff have a world-wide reputation under the name of "Waltham" watches. The evidence proved to the satisfaction of the court that the defendants were trying unfairly to obtain the benefit of the plaintiff's reputation. Mr. Justice Holmes granted an injunction against the use of the words "Waltham Watch" or "Waltham Watches," alone or in combination.

In the second case, the plaintiff had established some fifty years ago a clothing-store on Dock square, in Boston, which he has always painted a vivid blue, and which he called, and still calls, "The Blue Store Clothing House." Owing to large expenditures in advertising, the plaintiff's store has become widely known under this name, and acquired a reputation for excellence. Within a few weeks the plaintiff gave up a shop adjoining his own building which he had used for several years in connection with his business, and which had been painted the same color as his main building. Before leaving, the plaintiff was careful to paint this shop brown. The defendants leased this shop immediately on the expiration of the plaintiff's lease, painted it the same blue as the plaintiff's, — an expensive and unusual color, — and advertised in various ways as the "Blue Store Clothing House." The evidence disclosed to the satisfaction of the court a scheme to obtain the benefit of the plaintiff's laboriously earned reputation, and Mr. Justice Charles Allen granted an injunction, but only against the use of the words "Blue Store" alone or in combination.

The question in all these cases seems now to be how far the court will go. Is the court bound by the analogy of trade-marks proper? Will the court refuse an injunction because the words or signs are such that they would not be a valid trade-mark? Will the court hesitate because the word or sign is of such a description that no one can have an exclusive right to it? The cases I have cited seem to me to answer these questions decisively. The principle is the prevention of fraud in each specific case, whether its manifestation be by color, or word, or sign, or mark. The court, finding that in a certain case the fraud which is likely to deceive and does deceive the public and induce them to buy the goods of

the defendant under the belief that they are the goods of the plaintiff is of a certain kind, may go to any length it deems just to suppress the fraud. Once let it be recognized that cases of trade-mark and cases analogous to trade-mark differ radically, in that the one gives an exclusive right and the other abates a particular fraud, and there is no longer any difficulty in working out what must seem clearly to every honest man to be substantial justice. And the only logical consequence of the decisions in this class of cases is the application of the principles of equity in each individual case.

To recapitulate in a few words what I believe to be of the law of trade-mark as distinguished from the principle which already is, or is to become, the law of cases analogous to trade-marks: A trade-mark is a definite and technical sign which is capable of registration as the exclusive right of an individual, and there will be no relief, whether there is fraud or not, unless there is a technical breach of that mark. In cases analogous to trade-marks fraud is the gist of the action, and where fraud is found the court is able to give equitable relief, whether there is a breach of a technical right or not; and the relief may extend to whatever acts cause the damage complained of, whether or not the acts would be a breach of the plaintiff's right in the case of a trade-mark proper.

The decision of the courts, in cases of this sort, have a far-reaching effect on commercial morality. It is not simply a question of expediency which they are called upon to try, but how best to mould the opinion of the community that right may prevail rather than wrong. Whether trade rivalry shall be open and fair, so that each may be stimulated to his best endeavor in the knowledge that his exertions will bring him in to the full the honor and profit which are his due, or whether fraud, which knows how to evade definite rules, shall reap the fruits of honest labor and hardly-won reputation, is within the discretion of the court. In France commercial morality is high, and the rules as to unfair rivalry in trade are strict. In this country our commercial honesty is proverbially low, and it remains to be seen whether our courts will check the tendency of our business relations towards a lower standard.

*Grafton Dulaney Cushing.*